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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 687, 688, 689

ILLINOIS CENTRAL RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND MONON RAILROAD,

Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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PAGE

TABLE OF CONTENTS

	PAGE
THE COMMISSION'S CONCLUSIONS	2
THE DISTRICT COURT'S CONCLUSION	3
ARGUMENT:	
POINT I. There is warrant in the law and the facts for the Commission's conclusion that the public interest considerations overwhelmingly favor approval of MoPac control of Eastern, notwithstanding the Section 5(4) violation	5
A. The Commission's Balancing Test	5
B. The Commission's Power and Responsibility	6
C. The Commission's Application of the Balancing Test, Affirmed by the District Court, Does Not Present a Substantial Question	7
POINT 2. There is warrant in the law and the facts for the Commission's refusal to reopen to receive evidence of Eastern's current financial condition	9
POINT 3. Monon's complaint is premature	13
CONCLUSION	18

TABLE OF CASES

Alamo Express, Inc. v. *United States,* 239 F. Supp. 694 (W.D. Tex), affd. 382 U.S 19	7, 18
American Airlines v. *Civil Aeronautics Board,* 178 F. 2d 903 (7 Cir.)	15
Atchinson, T. & S. F. R. Co. v. *United States,* 284 U.S. 248	12

PAGE

Atlantic Transp. Co.-Control and Merger, 56 M.C.C. 329 8

Benton v. *United States*, 114 F. Supp. 37 (M.D. Ga.) 1a
Braniff Airways, Inc. v. *CAB*, 147 F. 2d 152 (D.C. Cir.) 12f
Broth. of Maintenance of Way Employees v. *United States*, 221 F. Supp. 19 (E.D. Mich.), affd. 375 U.S. 216 ..... 13, 2a

Canadian Pacific Railway Co. v. *United States*, 158 F. Supp. 248 (D. Minn.) 4, 1a
Central of Georgia R. Co. Control, 307 I.C.C. 39 .... 6, 8
City of Nashville, Tennessee v. *United States*, 155 F. Supp. 98 (M.D. Tenn.), affd. 355 U.S. 63 ..... 1a
Columbia System v. *U.S.*, 316 U.S. 407 ..... 17f
Continental Bank and Trust Company v. *Martin*, 303 F. 2d 214 (D.C. Cir.) 16
County of Marin v. *United States*, 356 U.S. 412 ..... 6f

East Texas Line v. *Frozen Food Exp.*, 351 U.S. 49 ... 17f
Eccles v. *Peoples Bank*, 333 U.S. 426 ..... 15, 18
Ecker v. *Western Pacific R. Co.*, 318 U.S. 448 13
El Dorado Oil Works v. *U.S.*, 328 U.S. 12 ..... 17f
Erie-Lackawanna Railroad Company v. *United States* (not yet reported, S.D.N.Y.) 2a

Florida East Coast Ry. Co. v. *United States* (not yet reported, M.D. Fla.), after remand in 382 U.S. 1954, revg. 242 F. Supp. 14 (M.D. Fla.) 2a
Fried v. *United States*, 212 F. Supp. 886 (S.D.N.Y.) 1a
Friedman v. *United States*, 168 F. Supp. 815 (S.D.N.Y.), affd. 359 U.S. 205 ..... 1a
Frozen Food Exp. v. *United States*, 351 U.S. 40 .... 17f

Gilbertville Trucking Co. v. *U.S.*, 371 U.S. 115 .... 6, 7, 8, 18
Great Lakes Airlines v. *CAB*, 294 F. 2d 217 (D.C. Cir.), cert. den. 366 U.S. 965 ..... 12f
Group of Institutional Investors v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523 13

PAGE

Insurance Group v. *D. & R. G. W. R. Co.*, 329 U.S. 607 13
I. C. C. v. *Jersey City*, 322 U.S. 503 .....10f, 13, 18

McLean Trucking Co. v. *United States*, 321 U.S. 67 . 4, 7f
Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 ..... 4, 18
Missouri Pac. R. Co. v. *United States*, 4 F. Supp. 449 (E.D. Ky.), affd. 293 U.S. 524 ..... 1a

National Van Lines, Inc. v. *United States*, 326 F. 2d 362 (7 Cir.) 17f
Nelson, L. & Sons Transp. Co.-Control and Merger, 80 M.C.C. 257 8
N. Y. Central Securities Co. v. *U.S.*, 287 U.S. 12 .... 1a
New York, C. & St. L. R. Co. v. *United States*, 95 F. Supp. 811 (N.D. Ohio) 1a
Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railway Co.—Merger, 324 I.C.C. 1 ..... 14f

Panhandle Pipe Line Co. v. *Comm'n*, 322 U.S. 507 17f
Pennsylvania R. Co.—Merger—New York Central R. Co., 327 I.C.C. 475 ..... 16f
Pennsylvania R. Co. v. *United States*, 363 U.S. 202 17f
Powell v. *United States*, 300 U.S. 275 ..... 17f

Railway Express Agency, Inc. v. *C.A.B.*, 345 F. 2d 445 D.C. Cir.), cert. den. 382 U.S. 79 15
Rochester Tel. Corp. v. *U.S.*, 307 U.S. 125 ..... 17f

Schwabacher v. *United States*, 104 F. Supp. 875 (D.D.C.), after remand in 334 U.S. 182, revg. 72 F. Supp. 560 (E.D. Va.) 1a
Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, affd. *Florida East Coast Ry. Co.* v. *United States* (M.D. Fla.) 14f
Seaboard Air Line R. Co. v *U. S.*, 382 U.S. 154 ..... 7f
Stott v. *United States*, 166 F. Supp. 851 (S.D.N.Y.) 1a
Sunray Mid Continent Oil Co. v. *Federal Power Com'n*, 270 F. 2d 404 (10 Cir.) 15

PAGE

Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134 ... 14f

U.S. v. *Detroit Navigation Co.*, 326 U.S. 236 7

United States v. *Norfolk and Western Railway Co.*, No. 20, decided Nov. 14, 1966 ..... 10f

U.S. v. *Pierce Auto Lines*, 327 U.S. 515 .....3, 10, 12, 18

STATUTES

5 U.S.C. § 704 .....16, 18

49 U.S.C. § 5(2)(a)(ii) 14f

MISCELLANEOUS

Mich. L. Rev. 543 ..... 14f

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Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM [1]

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the undersigned appellee [2] joins in the motions

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[1] The parties will be identified as in the District Court opinion: Eastern for Chicago and Eastern Illinois Railroad Company; IC for appellant Illinois Central Railroad Company; Cotton Belt for appellant St. Louis Southwestern Railway Company; Monon for appellant Monon Railroad; MoPac for appellee Missouri Pacific Railroad Company; L&N (called "Dixie Line" by the Commission) for appellee Louisville and Nashville Railroad Company.

Initialled references are to the respective jurisdictional statements and motions to affirm. References captioned "J.S." are to Appendices 1 and 2 to appellants' jurisdictional statements. References captioned "Tr." and "Ex." are to the Commission's transcript and exhibits. References captioned "Doc." are to the documents in the District Court record, which has been filed in this Court.

[2] The undersigned is a stockholder of Eastern, who participated throughout the Commission proceeding (J.S. 35a), and intervened in the District Court in support of the Commission's order (J.S. 1a).

of the other appellees that the judgment of the District Court be affirmed. This motion adopts the statements of appellees Commission and MoPac; and will not repeat arguments fully treated by them.

The Commission's Conclusions

The Commission concluded:

1. "Eastern's preservation as a prosperous competitive rail carrier under the control of Missouri Pacific . . . is clearly in the public interest—certainly far more so than would be its eventual subjugation and disintegration under the control of Illinois Central . . . or its continued operation as a self-restricted, financially weak system as at present" (J.S. 91a);

2. "Approval of the Illinois Central plan would deny to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need" (J.S. 45a);

3. "Of paramount importance in these deliberations is the impact our decision will have upon the public interest. * * * To deny Eastern the relief and assistance offered through the several proposals now before us, would leave it foundering and of diminishing value to either the public generally or to its own security holders. Twice since the turn of the century Eastern has had to be rescued from bankruptcy by a reorganization—in 1922 and again in 1941; and now, in these proceedings we have the opportunity to approve remedial proposals capable of preventing a

recurrence, at least in the foreseeable future" (J.S. 90a-91a);[3]

4. "Even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application. For, in carrying out the duty imposed upon us by law, we must necessarily make an appraisal of the whole case, and thereupon determine that disposition which would best serve the public interest. *A violation of section 5(4) does not automatically defeat a transaction.** If overriding public interest considerations are plainly evident, they are not to be rejected merely for the sake of returning the wrongdoer to the status quo ante; but should be recognized as justifying approval of the transaction. In our opinion, the public interest considerations in these proceedings overwhelmingly favor approval of Missouri Pacific's control of Eastern subject to conditions for inclusion of Dixie Line, notwithstanding the section 5(4) violation" (J.S. 89a-90a).

The District Court's Conclusion

The District Court adhered to this Court's mandate that "the function of the reviewing court . . . is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done" (*U.S.* v. *Pierce Auto Lines,* 327 U.S. 515, 536 [1946]) (J.S. 15a).

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[3] The Examiner reported that, under MoPac's estimates, as to which "there is sufficient validity . . . to be accorded full consideration in the determination herein" (J.S. 180a), from and after about the fifth year of operation under common control, Eastern's net railway operating income (before Federal income taxes) would be increased by $6.1 millions (J.S. 127a). This is 2.7 times Eastern's average for the five-year period 1961-5. See Moody's Transportation Manual (1966), p. 159.

* Unless otherwise indicated, all italics are supplied.

This mandate is especially applicable to railroad control and merger cases.

In *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959), this Court approved the Commission's order awarding joint control of Toledo, Peoria & Western Railroad to Pennsylvania and Santa Fe, in preference to the competing bid of Minneapolis & St. Louis. The Court (at pp. 187-8) repeated with approval the following language from *McLean Trucking Co.* v. *U. S.,* 321 U. S. 67, 87-8 (1944):

> "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission' . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with public interest.'"

This reliance on the Commission's "expert judgment and considerable knowledge of the transportation industry," which led to affirmance of Commission approval of control or merger in the two foregoing cases, induced similar affirmances in every other case of judicial review of such Commission orders approving railroad control or merger applications.[4] The Court is respectfully referred to the opinions in *Minneapolis & St. Louis, supra*; and in the Spokane International case (*Canadian Pacific Railway Co.* v. *United States,* 158 F. Supp. 248 [D. Minn. 1958]), in both of which the Commission likewise favored an "end-to-end" over a "side-by-side" relationship (see J.S. 2a), because the latter would result in disemployment of many persons, in destruction of competition, and in abandonment of lines.

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[4] See cases in Appendix.

ARGUMENT

1. There is warrant in the law and the facts for the Commission's conclusion that the public interest considerations overwhelmingly favor approval of MoPac control of Eastern, notwithstanding the Section 5(4) violation.

2. There is warrant in the law and the facts for the Commission's refusal to reopen to receive evidence of Eastern's current financial condition.

3. Monon's complaint is premature.

POINT 1

There is warrant in the law and the facts for the Commission's conclusion that the public interest considerations overwhelmingly favor approval of MoPac control of Eastern, notwithstanding the Section 5(4) violation.

A. The Commission's Balancing Test

Having made the uncontroverted and uncontrovertible finding that the public interest would best be served by authorizing MoPac's control of Eastern (see J.S. 4a), "[t]he Commission applies a balancing test" (District Court opinion, J.S. 6a). "While § 5(2) directs Commission approval of a proposed control transaction if it will be 'consistent with the public interest,' § 5(4) declares it unlawful to enter into such a transaction without § 5(2) approval. Denial of a § 5(2) application because of a § 5(4) violation may deprive the public of important transportation benefits; approval of a § 5(4) *fait accompli* rewards the lawbreaker. The Commission is not a stranger to this dilemma" (*ibid.*, 5a).

Appellants urge as two "substantial" questions requiring answers by this Court:

(a) Whether the Commission must consider the merits of a railroad control application even though the applicant has already violated Section 5(4), "or whether in such circumstances it has the *power* to deny the application . . . solely on the ground of the antecedent violation" (IC 4; CB 5);

(b) Whether the Commission's conclusion, that the Section 5(4) violation was outweighed by public interest considerations under Section 5(2),[5] "was correct as a matter of law and rested upon adequate findings, supported by substantial evidence" (IC 4; CB 4-5).

B. The Commission's Power and Responsibility

The Commission does not need a judicial pronouncement on the subject of its power. The Commission knows that it has power to deny an application for control because of a violation of § 5(4), and exercised it in the *Central of Georgia* case by denying Frisco's application because its violation outweighed the public benefits of the proposal in that case (J.S. 5a-6a; see also 307 I.C.C., at pp. 39-41). This Court has already confirmed "the principle recently stated by the Commission in *Central of Georgia R. Co. Control,* 307 I.C.C. 39, 43, that a § 5(4) violation may alone bar approval of a merger *unless, 'upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval'*" (*Gilbertville Trucking Co.* v. *U.S.,* 371 U.S. 115, 128 [1962]).

What the Commission meant in saying "we are not free to summarily deny Missouri Pacific's application" because of the statutory violation (IC 4, 11, 14-16, 18; CB 5, 9, 16-17; but *cf.* complete context of Commission's Report, p. 3, *supra*) is that it was not free to abdicate its "heavy re-

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[5] "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States,* 356 U.S. 412, 416 [1958]).

sponsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives" of Section 5(4) (*Gilbertville, supra,* at p. 130); nor its statutory function "to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies" (*U. S.* v. *Detroit Navigation Co.*, 326 U.S. 236, 241 [1945]). The Commission is charged with the same duty of applying a balancing test here as it has when a proposed merger may impinge on antitrust principles,—something at least as offensive to public policy as a violation of § 5(4).[6]

C. The Commission's Application of the Balancing Test, Affirmed by the District Court, Does Not Present a Substantial Question

In *Alamo Express, Inc.* v. *United States*, 239 F. Supp. 694 (W.D. Tex. 1965), affd. 382 U.S. 19 (1965), the District Court said (p. 696):

> ". . . [T]he Commission concluded that the control and management of INLAND in a common interest with CENTRAL had been effectuated and was in violation of Section 5(4) of the Act and had continued until September 5, 1961, when terminated by the grant of temporary control authority. The violation, however, was found not to be such as to preclude CENTRAL as being unfit to control INLAND, nor so aggravated as to prevent approval in the control case, *if it could otherwise be found to be consistent with the public interest*" (italics in original).

[6] "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy" (*McLean Trucking Co.* v. *U. S., supra,* 321 U.S. 67, 87 [1944]). See also *Seaboard Air Line R. Co.* v. *U. S.*, 382 U.S. 154, 156-7 (1965).

The control in that case was found to have been actually effectuated and to have persisted since December 1, 1957 (nearly four years) (90 M.C.C., at pp. 787-8). Contrast this with the case at bar, where actual control had never been effectuated and when the violation lasted for only eight months (J.S. 3a).

With the issue clearly focused by appellants' jurisdictional statement which made many of the arguments urged by appellants herein,[7] this Court granted the motion to affirm.

The Commission similarly granted control applications in seven other motor carrier cases despite § 5(4) violations by the respective applicants. *Atlantic Transp. Co.-Control and Merger,* 56 M.C.C. 329, 340 (1950); see cases cited in J.S. 6a; and in *L. Nelson & Sons Transp. Co.-Control and Merger,* 80 M.C.C. 257, 265 (1959). *Central of Georgia* and the instant case are the only railroad control applications wherein the issue was squarely adjudicated by the Commission.[8] In *Gilbertville Trucking Co.* v. *U.S., supra,* after discussing the Commission's rule in *Central of Georgia,* this Court said (371 U.S. 105, at p. 129): "In fact, *the Commission's rule is not automatic and will give way to a clear showing of public interest in approval.*"[9]

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[7] "* * * The approval of the instant transaction was to 'bless' the 'reckless and flagrant disregard for the Commission's authority,' and does not comport with the general rule announced by the Commission" (pp. 22-3).

[8] "The Commission was correct in saying that 'unlike the flagrant disregard for the law which characterized the situation in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39 (1958), there are in the present record a number of factors mitigating the unlawful conduct'" (District Court opinion, J.S. 14a-15a).

[9] The fact that the Civil Aeronautics Board adopts a Draconian automatic rule (IC 16-17, 22-3) is totally immaterial. The Interstate Commerce Commission is entrusted with the responsibility of regulating rail and motor carrier transport, in which it has the expertise; it is not required to apply in its field the principles which the Civil Aeronautics Board finds appropriate in the exercise of its expertise in air transport.

The District Court here was clearly right in affirming the Commission's application of the balancing test (J.S. 16a). IC and Cotton Belt in effect ask the Commission to punish *Eastern and the public* for MoPac's violation,—which was effectively corrected within eight months, and which did no harm to Eastern or to the public interest during its short duration. Eastern is to be punished, either (a) by being kept independent, which "would leave it foundering and of diminishing value to either the public generally or to its own security holders" (J.S. 91a); or (b) by placing it under IC domination, where "Eastern would be so restricted in its conduct of its own operations that, in the event such domination were to be terminated, voluntarily or otherwise, the reestablishment of Eastern as an independently operated carrier would be entirely impracticable, if not impossible" (J.S. 44a). The public is to be punished by denying "to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need" (J.S. 45a).

POINT 2

There is warrant in the law and the facts for the Commission's refusal to reopen to receive evidence of Eastern's current financial condition.

Appellants argue that a "substantial" question is presented by the Commission's refusal to reopen the record to receive evidence concerning "the significant improvement in the financial and operational health of [Eastern] whose debility as depicted in the stale record on which the Commission's decision was based underlay the Commission's conclusion that absorption of [Eastern] by another railroad [MoPac] would be in the public interest" (IC 5, 32-3; CB 5, 19-20). Chief Judge Campbell's dissent accepted this argument (J.S. 32a).

The Commission's refusal to reopen was based upon the finding in its order of June 29, 1966 that "the alleged

recent short-term improvement in the financial condition of [Eastern] is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest''.

". . . [I]t has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City, supra* [322 U.S. 503 (1944)]. *Only a showing of the clearest abuse of discretion could sustain an exception to that rule''* (*U. S.* v. *Pierce Auto Lines,* 327 U.S. 515, 535 [1946]).[10]

The evidence tendered by appellants (IC 32-3; CB 19-20) is contained in Cotton Belt's petition to reopen (Doc. No. 46), which cites certain facts in Eastern's 1965 Annual Report to the Commission (pp. 5-7). But this very report emphasizes the validity of the Commission's reiteration of its conclusion "that [Eastern's] affiliation with a stronger railroad will be consistent with the public interest."

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[10] "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening" (*Jersey City, supra,* 322 U.S., at p. 514).

"Appellees also insist that a new hearing be held so that evidence of 'present conditions' could be presented to the Commission rather than 'speculation.' It is true that this case has been pending for 10 years but this, rather than being a reason for holding additional hearings, operates to the contrary" (*United States* v. *Norfolk and Western Railway Co.,* No. 20, decided Nov. 14, 1966, slip opinion, pp. 17-18).

That report contains the following Balance Sheet as of the close of 1965 (Doc. No. 48, p. 7):

Current Assets	
Cash	$ 4,018,058
Accounts receivable	4,709,283
Materials and supplies	2,618,189
Other current assets	96,789
Total current assets	$11,442,319
Current Liabilities	
Accounts payable	$ 5,937,038
Payroll and vacation pay	1,605,123
Taxes	1,353,654
Other	373,698
Total current liabilities	$ 9,269,513
Long-term debt due within one year	3,380,024
Total Current Liabilities, including long-term debt due within one year	$12,649,537

Obviously materials and supplies, while treated as current assets under the Commission's accounting procedures, cannot be used to meet a payroll or other operating expenses. Eliminating this leaves $8.8 millions of current assets to meet current liabilities and long-term debt due within one year aggregating $12.6 millions.

Cotton Belt's petition emphasizes Eastern's issue of new common stock in 1965, and the rise in the price of its common stock since 1961 (Doc. No. 46, pp. 7-8). But the vagaries of the market place are no substitute for the expertise of the Commission.

In Statement BE, the verified testimony of Eastern's President filed with the Commission and made a part of its record, he detailed the inherent weaknesses which brought Eastern to its present precarious financial condition, and

which have not been and cannot be cured by one or a few years of improved earnings:

> "a. Location in an area abundantly served by transportation agencies (p. 12);
>
> b. Higher terminal costs of small railroads (p. 17);
>
> c. Greater impact of wage increases and labor working rules on small railroads because of intense competition (p. 19);
>
> d. Higher cost of sales in relation to revenue (p. 17);
>
> e. Lack of an adequate and flexible car supply (p. 18);
>
> f. Tendency of shippers to locate new plants on large railroads serving existing plants (p. 18);
>
> g. Tendency of shippers to favor large railroads which can reciprocate by substantial purchases (p. 18)."

Atchison, T. & S. F. R. Co. v. *United States*, 284 U.S. 248 (1932), the case relied on by appellants (IC 33-4; CB 20-1), has no application to the facts at bar. "That case, as has been indicated more than once, was 'promptly restricted . . . to its special facts, *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, and it stands virtually alone' " (*Pierce Auto Lines, supra*, 327 U.S., at pp. 534-5).[11]

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[11] *Great Lakes Airlines* v. *CAB*, 294 F. 2d 217, 228 (D.C. Cir. 1961), cert. den. 366 U.S. 965 (1961), and *Braniff Airways, Inc.* v. *CAB*, 147 F. 2d 152, 153 (D.C. Cir. 1945) (IC 34), have nothing to do with an alleged improvement in financial condition. In those cases, the Civil Aeronautics Board, having denied licenses because of lack of qualification of applicants' owners, was held to have abused its discretion in refusing to reopen to admit evidence of change of ownership.

Applicable here is the pronouncement in *I.C.C.* v. *Jersey City*, 322 U.S. 503 (1944), where the Court said, per Jackson, J. (p. 517): "We have rejected the plea of railroad stockholders that events subsequent to approval of a reorganization plan of a very similar character to those alleged here, require its return for consideration. *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523, 542-44; *Ecker* v. *Western Pacific R. Co.*, 318 U.S. 448, 506-9." Yet the estimates of future earnings based on the records in those cases have been used by the Commission, with the approval of this Court, as the basis for liquidating large portions of debt, as well as stock interests, despite the claim that the failure to consider substantial increases in earnings since the record was closed violates due process. See Frankfurter, *J.*, dissenting, in *Insurance Group* v. *D. & R. G. W. R. Co.*, 329 U.S. 607, 621, *et seq.* (1947); *Cf. Western Pacific, supra,* 318 U.S., at pp. 475-7; *Milwaukee* case, *supra,* 318 U.S., at pp. 536-9.

Those cases would apply *a fortiori* here, where the effect of the Commission's finding is to permit Eastern to "have access to revitalizing resources outside of itself [essential], if it is to survive as a positive and contributing element of the national transportation system" (J.S. 91a). The Commission did not have to find that Eastern was already on the courthouse steps. *Broth. of Maintenance of Way Employees* v. *United States;* 221 F. Supp., 19, 22, 30 (E.D. Mich. 1963), affd. 375 U.S. 216 (1963).

POINT 3

Monon's complaint is premature.

The Commission concluded that "[w]e would be derelict in our responsibility to serve the public interest, if, in the face of this record, we failed to provide Dixie Line an *opportunity* to acquire the Evansville line . . .; the operation of [which] by Dixie Line would be consistent with the

public interest" (J.S. 57a). Accordingly, the Commission's order requires MoPac, upon assuming control, immediately thereupon to "take all reasonable, necessary and appropriate steps to cause Eastern to negotiate in good faith for the sale to Dixie Line" of the Evansville Line (J.S. 67a).[12]

MoPac has accepted that condition. Whether or not the parties agree on the terms of acquisition, § 5(2) requires that the Commission must approve the transaction, and the order specifically provides that L&N would have to make such an application (J.S. 68a).[13]

Monon's attack on the L&N condition does not present a substantial question (see Mon 3-4).

First, judicial review at this time would be premature. There is no assurance at this time that L&N will ever make such application.[14] There is a wide divergence between the

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[12] The Commission had to make the foregoing finding of public interest in order to incorporate the condition for compulsory negotiation, and the reservation of jurisdiction to enforce it (J.S. 25a-26a). See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 186-8, 268-9 (1963), affd. *Florida East Coast Ry. Co.* v. *United States* (M.D. Fla. June 6, 1966); *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railway Co.—Merger*, 324 I.C.C. 1, 28, 148 (1964); Note, 63 Mich. L. Rev. 543 (1965).

[13] The order also directs that necessary steps be taken to grant L&N trackage or joint use rights, pending final determination of its acquisition. Monon alleges possible injury from such a temporary grant (Mon 9).

The complete answer is L&N's unequivocal statement that it will not apply for interim trackage or joint use rights (L&N 10 fn.). If it did, Commission approval would still be required. § 5(2)(a)(ii); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146-8 (1946).

[14] The allegation that "control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line" (Mon 6, 13) is not supported by the cited portions of the report (J.S. 67a-68a, 92a). "The conditions requested by Dixie Line would be mandatory only in the sense that good faith negotiations would be required. However, . . . they would not make it mandatory that the negotiations be successful and the acquisition be accomplished" (J.S. 56a). See also District Court opinion (J.S. 26a).

parties regarding the value of the Evansville line (*cf.* Exs. H-179 and H-147 with Tr. 3325 and 3870). And L&N's president stated unequivocally that he was "not willing to let any outside agency such as the Commission or arbitrators fix a reasonable price" (Tr. 2975-6),—a position reiterated by its counsel at oral argument before the Commission (Tr. 5901-2). See also L&N 14.

In short, the condition directing compulsory negotiations for sale of the Evansville line to L&N is an "iffy" condition, which had to be imposed in the instant order to retain the Commission's jurisdiction, but which may never hurt Monon,—either because the Commission may not approve a price agreed on by MoPac and L&N, or because the latter may not agree to the price fixed by the Commission, or because the Commission may find that the injury to Monon outweighs the public benefits of the sale, or because the Commission may impose conditions which Monon finds to be adequate protection.

"The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determination" (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 [1948] [Federal Reserve Board]). "Inasmuch as petitioners have lost nothing and have had imposed upon them no obligation by the board's direction to the [Railway Express] [15] and no final order has been entered, we think that no right of petitioners to complain has matured" (*American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903, 910-11 [7 Cir. 1949]; *cf. Railway Express Agency, Inc.* v. *C.A.B.*, 345 F. 2d 445 [D.C. Cir. 1965], cert. den. 382 U.S. 879 [1965]). See, to the same effect, *Sunray Mid Continent Oil Co.* v. *Federal Power Com'n*, 270 F. 2d 404, 407 (10 Cir. 1959).

Secondly, if on L&N's subsequent § 5(2) application the Commission does direct sale to it of the Evansville line,

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[15] The Board had directed Railway Express to negotiate revised air express agreements with petitioner air lines and to submit such revised agreements to the Board within six months (p. 910).

the Commission would not confine itself to "approv[ing] the details of said acquisition" (Mon 3, 7-8). In order to make the finding that the sale to L&N will be consistent with the public interest, the Commission would have to evaluate its competitive effect on Monon (see Mon 10-12).[16] "Monon will have ample judicial protection if and when the final L&N § 5(2) application for purchase of the Evansville line is approved by the Commission. Monon can raise its objections at that time" (District Court opinion, J.S. 26a-27a).

"* * * [F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action" (5 U.S.C. § 704).

In *Continental Bank and Trust Company* v. *Martin*, 303 F. 2d 214 (D.C. Cir. 1962), the Bank had been admitted to the Federal Reserve System in 1952, subject to the express condition that "the net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities" (p. 215). In accordance with this condition, the Board, on July 18, 1960, ordered the Bank to increase its capital and surplus by not less than $1,500,000 within six months.

The Bank filed suit for a declaratory judgment that the order was void. The District Court dismissed the complaint for lack of jurisdiction. In affirming, the Court said (pp. 217-8):

> "Thus far there has been no definite legal consequence attributable to the order of July 18, 1960.

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[16] In its report in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966), the Commission said (p. 540):

"* * * L&N is accorded the right merely to negotiate for the acquisition of C&EI's Evansville-Chicago line. The acquisition itself would require our prior approval in a separate section 5(2) proceeding, and any adverse effect thereof upon other carriers would be material to that proceeding."

> There is no fine, penalty or other sanction which flows from the Bank's refusal to abide by that order. Forfeiture of membership in the System does not ensue. * * *
>
> * * *
>
> "* * * [N]othing eventuates of a legal character upon failure to comply unless the Board proceeds under [12 U.S.C. § 327].
>
> "* * * *Action taken as a result of those proceedings no doubt would be 'final agency action' which, if adverse to the Bank, could be judicially reviewed.*"

The L&N condition herein is "preliminary, procedural, or intermediate agency action". It bears no similarity to administrative orders which were held reviewable because (a) they had "an immediate and practical effect" on complainant by determining status [17] or construing tariffs; [18] or (b) being made in the exercise of the delegated legislative function of rule making, the regulations promulgated "affect or determine rights generally, even though not directed to any particular person or corporation" [19] or (c) they were advisory orders rendered at the request of a court in regard to technical rate matters entrusted to the agency's primary jurisdiction.[20]

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[17] See, e.g., *Frozen Food Exp.* v. *United States*, 351 U.S. 40, 43-5 (1956) (*Cf. East Texas Line* v. *Frozen Food Exp.*, 351 U.S. 49 [1956]); *Rochester Tel. Corp.* v. *U. S.*, 307 U.S. 125, 143-4 (1939); *Panhandle Pipe Line Co.* v. *Comm'n*, 332 U.S. 507, 511-12 (1947).

[18] See, e.g., *Powell* v. *United States*, 300 U.S. 276, 284-5 (1937); *National Van Lines, Inc.* v. *United States*, 326 F. 2d 362, 367-73 (7 Cir. 1964).

[19] See, e.g., *Columbia System* v. *U. S.*, 316 U.S. 407, 417-25 (1942).

[20] See, e.g., *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205 (1960); *El Dorado Oil Works* v. *U. S.*, 328 U.S. 12, 18-19 (1946).

Conclusion

The District Court has correctly applied the principles enunciated by this Court in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959); *Gilbertville Trucking Co.* v. *U. S.,* 371 U.S. 115 (1962); *Alamo Express, Inc.* v. *United States,* 382 U.S. 19 (1965); *U. S.* v. *Pierce Auto Lines,* 327 U.S. 515 (1946); *I.C.C.* v. *Jersey City,* 322 U.S. 503 (1944); and *Eccles* v. *Peoples Bank,* 333 U.S. 426 (1948); and has correctly construed 5 U.S.C. § 704.

It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The motions to affirm should therefore be granted.

Respectfully submitted,

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November 29, 1966.

Appendix

Judicial Affirmance of Commission Orders Approving Railroad Control or Merger Application

N. Y. Central Securities Co. v. *U. S.*, 287 U.S. 12, 24-5, 28 (1932) (New York Central control of Big Four and Michigan Central);

Missouri Pac. R. Co. v. *United States*, 4 F. Supp. 449, 452 (E.D. Ky. 1933), affd. 293 U.S. 524 (1934) (Southern Pacific control of Cotton Belt);

New York, C. & St. L. R. Co. v. *United States*, 95 F. Supp. 811, 815-6 (N.D. Ohio 1951) (Pennsylvania control of Detroit, Toledo & Ironton);

Schwabacher v. *United States*, 104 F. Supp. 875, 882 (D.D.C. 1952), after remand in 334 U.S. 182 (1948), revg. 72 F. Supp. 560, 561 (E.D. Va. 1947) (Chesapeake & Ohio-Pere Marquette merger);

Benton v. *United States*, 114 F. Supp. 37, 44-5, 47 (M.D. Ga. 1953) (Central of Georgia control of Southwestern);

City of Nashville, Tennessee v. *United States*, 155 F. Supp. 98, 104 (M.D. Tenn. 1957), affd. 355 U.S. 63 (1957); *Stott* v. *United States*, 166 F. Supp. 851, 857 (S.D. N.Y. 1958) (Louisville and Nashville—Nashville, Chattanooga & St. Louis merger);

Canadian Pacific Railway Co. v. *United States*, 158 F. Supp. 248, 252 (D. Minn. 1958) (Union Pacific control of Spokane International);

Friedman v. *United States*, 168 F. Supp. 815, 818 (S.D. N.Y. 1958), affd. 359 U.S. 205 (1959) (Illinois Central merger with Alabama and Vicksburg, and Vicksburg, Shreveport and Pacific);

Fried v. *United States*, 212 F. Supp. 886, 889 (S.D. N.Y. 1963) (Erie-Lackawanna merger);

Broth. of Maintenance of Way Employees v. *United States*, 221 F. Supp. 19, 24 (E.D. Mich. 1963), affd. 375 U.S. 216 (1963) (Chesapeake & Ohio control of Baltimore & Ohio);

Florida East Coast Ry. Co. v. *United States* (not yet reported, M.D. Fla. June 8, 1966), after remand in 382 U.S. 154 (1965), revg. 242 F. Supp. 14 (M.D. Fla. 1964) (Seaboard Air Line-Atlantic Coast Line merger), now on appeal to this Court;

Erie-Lackawanna Railroad Company v. *United States* (not yet reported, S.D. N.Y. Oct. 4, 1966) (Pennsylvania-New York Central merger), now on appeal to this Court.

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